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QUESTIONS PRESENTED

(1) Whether the Employee Retirement Income Security Act of 1974 ("ERISA") pre-empts a state's judicially created cause of action, grounded on public policy, for recovery of damages for wrongful discharge of a non-governmental employee, which discharge was motivated by the employer's intent to avoid future pension plan obligations, when none of the damages claimed or relief sought includes any pension plan benefits or rights under the plan itself.

(2) Whether Petitioner has waived any right to raise or rely on any such alleged "ERISA" pre-emption by failing to properly and timely raise such issue below.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Perry McClendon and the Ingersoll-Rand Company. Mr. McClendon has no interest in any corporate entity or partnership.

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No. 89-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE RESPONDENT

Perry McClendon respectfully submits this brief on the merits and prays that this Honorable Court affirm the Texas Supreme Court's judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 779 S.W.2d 69 (Tex. 1989). The opinion of the 14th Court of Appeals of Texas is reported at 757 S.W.2d 816. The opinion of the 133rd Judicial District Court of Harris County, Texas is unreported.

STATUTORY PROVISIONS INVOLVED

Section 1001 of ERISA provides in pertinent part as follows:

> (a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect

> to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.
>
> (b) Protection of interest commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Section 502 of ERISA, 29 U.S.C. § 1132, provides in relevant part as follows:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or a beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Section 510 of ERISA, 29 U.S.C. § 1140, provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given

information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in pertinent part as follows:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

* * * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Texas Rule of Civil Procedure 94 provides as follows:

Rule 94. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbi-

tration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

Federal Rule of Civil Procedure 8(c) provides as follows:

> (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

STATEMENT OF THE CASE

This is a wrongful employment termination case which presents no federal question. Respondent makes no claims for pension benefits, and there are no issues with respect to the administration or regulation of a pension plan. Shortly after the litigation began, Petitioner, Ingersoll Rand, vested Mr. McClendon's pension. Since that time, Respondent has pursued only his claims for damages arising out of the wrongful termination of his employment.

Petitioner induced Mr. McClendon to uproot his family to move to a strange city in order to expand Ingersoll Rand's sales territory. Once Mr. McClendon pioneered a new territory and was about to earn substantial commissions, Ingersoll Rand fired him four months before his ten year pension vesting anniversary. Suit was then filed in the 133rd Judicial District Court of Harris County, Texas, alleging, among other things, a Texas state cause of action for wrongful employment termination and breach of an implied covenant and/or duty of good faith and fair dealing. Shortly after the suit was filed, Ingersoll Rand informed Mr. McClendon that he was fully vested in his pension benefits and, for the first time, agreed to pay his pension benefits. Accordingly, Respondent seeks no damages for pension benefits, and this suit raises no issues with respect to the administration or regulation of a pension plan. Rather, the suit seeks lost future wages, mental anguish and punitive damages engendered by Petitioner's wrongful termination of Mr. McClendon's employment. Petitioner at no time in its pleadings in the trial court raised any issue involving the Employer Retirement Income Security Act of 1974 ("ERISA") or the possibility of pre-emption.

The trial court granted a motion for summary judgment on grounds which had nothing to do with ERISA, and that ruling was affirmed by the 14th Court of Appeals. Pre-emption and ERISA were not raised at *any* stage by Ingersoll Rand. The appellate court held that Mr. McClendon's employment was an "at-will" employment which did not fall within any of the specific exceptions that prohibited employment termination in Texas. The appellate court also refused to apply the doctrine of good faith and fair dealing to the issue of employment termination.

The Texas Supreme Court granted writ on the issue whether the doctrine of good faith and fair dealing should apply to the employment setting. The Texas Supreme Court's decision, however, did not reach that issue. Instead, the Court created an additional exception to the Texas employment-at-will doctrine and held that a terminated employee can recover damages in Texas if the principal reason for the employment termination was the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund. Opp. Br. 1a.

The majority opinion by the Texas Supreme Court specifically stated that the wrongful termination cause of action was not pre-empted by ERISA. Each state is entitled to develop its own laws with respect to wrongful employment termination, and the Texas Supreme Court has done so in this case.

SUMMARY OF ARGUMENT

Respondent has conceded that he has received and will receive all of his pension rights and benefits. This is not a case seeking any pension rights or benefits. Rather, this case attempts to determine whether Petitioner's motives and reasons for terminating Respondent's employment

were proper under Texas law. This is not a federal question and has absolutely nothing to do with the Employment Retirement Income Security Act of 1974 ("ERISA"), or the administration or regulation of a pension plan. The Texas Supreme Court simply held that a plaintiff can recover damages for employment termination principally motivated by an attempt to avoid pension obligations.

Prior to this latest exception to the employment-at-will doctrine, the Texas Supreme Court created an exception whereby a plaintiff could recover damages if he or she were fired for refusing to commit a crime. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). Under *Sabine Pilot v. Hauck*, the fact finder must determine whether the employment termination was motivated by such a refusal. The crime can be a violation of a federal, state or local law; the law itself is not the relevant issue. Rather, the issue is whether the employer's decision to terminate was motivated by the refusal to commit the crime. The Texas Supreme Court's newest exception to the "at-will" doctrine is analogous. The specific pension plan, its contents or its administration are not relevant issues. Rather, the issue is whether the employer's decision to terminate was motivated by the employer's attempt to avoid its pension obligations. Consequently, ERISA and Ingersoll Rand's pension plan are irrelevant to this case.

The pre-emption provision of ERISA was included in that Act to standardize the administration and regulation of pension plans so that employers would not be subject to different rules and regulations when they operated across state lines. The intent of this provision was to forestall the administrative nightmares that would otherwise follow and enable these plans to be managed in a

more efficient manner. This Court has stated that permitting a federal law to pre-empt a state law is not favored and will not be done unless Congress has unmistakably ordained such a result to occur. *Florida Lime and Avocado Growers, Inc. v. Pall*, 373 U.S. 132, 142 (1963). The present fact situation is not one to which the ERISA pre-emption provision was intended to apply.

The plain meaning of Section 514(a), ERISA's pre-emption provision, applies only to a state law that "purports to *regulate*, directly or indirectly, *the terms and conditions* of employee benefit plans" covered by ERISA. (emphasis added). The state law formulated by the Texas Supreme Court is totally unrelated to the regulation of the terms and conditions of pension funds. More importantly, the Texas Supreme Court's exception to the employment at-will doctrine has nothing to do with ERISA-covered pension plans. The statutory pre-emption language, therefore, is inapplicable to this case.

In addition, this Court has confirmed that ERISA pre-emption applies only to state laws that deal with the administration or regulation of pension funds. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987), this Court stated that the focus of ERISA is on the "administrative integrity" of pension plans and that "[ERISA] [p]re-emption ensures that the *administrative practices* of a benefit plan will be governed by only a single set of regulations." (emphasis added). The Texas law before the Court has absolutely nothing to do with the *administrative practices* of any benefit plan. Rather, the Texas law merely prohibits a Texas employer from terminating one's employment for the principal reason of avoiding the payment of benefits under an employee benefit plan. This law does not intrude on ERISA's uniform

administrative scheme for pension plans, and pre-emption does not apply.

In addition to the specific reasons for the denial of pre-emption, the general purpose of ERISA mandates that this case remain a state cause of action. ERISA was originally conceived to safeguard employees from "such abuses as self-dealing imprudent investing, and misappropriation of plan funds." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15, quoting 120 Cong. Rec. 29932 (1974). It is clear from the facts that this case has nothing to do with the operation or administration of Peti- *Coyne*, 482 U.S. at 15, quoting 120 Cong. Rec. 29932 tioner's pension fund or with the types of laws intended to be covered by the ERISA pre-emption clause. Accordingly, pre-emption is inappropriate.

ARGUMENT

I.

INDIVIDUAL STATES, AND NOT FEDERAL LAW, HAVE TRADITIONALLY REGULATED AND GOVERNED THE LAW REGARDING TERMINATION OF EMPLOYMENT RELATIONSHIPS

It is beyond question that the individual states of the union have traditionally governed employer-employee relatinoships and have sought to formulate laws governing this relationship consistent with the public policy concerns of each state. More specifically, the individual states have traditionally and almost exclusively developed a set of laws and rules detailing the conditions and circumstances under which an employer could terminate a given employ-

ment relationship with a specific employee. For example, the employment at-will doctrine has been a part of Texas law for over 100 years, and this doctrine, until recently, has enabled employers to terminate employees employed on an indefinite basis with or without cause for such termination.[1] *East Line and R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888). Recently, the Texas Supreme Court has carved out specific exceptions to the employment at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck* and in this case.

In addition to Texas, other states have formulated their own rules with respect to an employer's ability to terminate one's employment. For example, the states uniformly recognize that an employer-employee may contractually agree that an employment relationship may not be terminated without good cause. *See, e.g., Fairmont Creamery Co. v. Ewing*, 43 Ohio App. 191, 182 N.E. 883 (1932). In addition, a number of states imply a covenant and/or duty of good faith and fair dealing into all employment contracts.[2] Finally, by way of example, New York, like Texas, provides a state cause of action for New York employees terminated solely because the employer sought to deprive the employee of his or her pension benefits. *See e.g. Savodnic v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D. N.Y. 1980); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D. N.Y. 1981).

---

1. Federal and state legislation has been enacted placing certain limits upon an employer's ability to discharge an employee at-will, but such legislation refers to very fact specific situations and does not apply to the current case. See Texas Supreme Court's summary of such laws at Opp. Br. 3a.

2. See, for example, *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (N.H. 1974); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); and *K-Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987).

These examples demonstrate that the individual states have traditionally formulated the rules governing wrongful employment termination based on the public policies of each state.

As stated, the Texas Supreme Court has recently scrutinized the Texas version of the employment at will doctrine and has taken steps to mitigate the harshness of the doctrine in accordance with the modern realities of the employment setting. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), the Texas Supreme Court recognized a cause of action for a plaintiff alleging that his employment termination was motivated by his refusal to perform an illegal act. The Court created an exception to the employment at-will doctrine to render this doctrine more consistent with the state's public policy. In the case before the Court, the Texas Supreme Court created another public policy exception to the "at-will" doctrine and provided a cause of action for employees whose termination is principally motivated by a desire to avoid making contributions to or paying benefits under a pension plan.

A comparison of these two recent exceptions to the Texas employment at will doctrine points out the weakness of Petitioner's pre-emption argument. If an employee is fired for refusing to commit a crime, it is irrelevant if it is a state, federal or local crime. The employer's *motivation*, not the type of crime, is the relevant issue. Similarly, if an employer terminates an employee to avoid making pension contributions and later enables the employee's pension to vest, the regulation or administration of the pension plan is irrelevant. Only the employer's *motivation* is relevant, and the substance or administration of the pension plan is unaffected.

It is axiomatic that each state has the power to formulate and devise laws affecting and governing the employment relationship between the employer and employee, and this power includes the state's ability to enact laws governing employment terminations. Absent the specific federal statutes that largely address certain types of employment discrimination (which do not apply to this case), the sovereign power of each state enables each state to formulate its own laws governing the employment relationship. This is what the Texas Supreme Court has done in its case. Its ruling does not conflict in any way with ERISA and has no effect on any pension plan, and ERISA generally, and its pre-emption provision specifically, therefore do not apply to this case.

II.

BOTH ERISA AND ERISA'S PRE-EMPTION PROVISION DO NOT APPLY TO THE CASE BEFORE THE COURT

As stated, the individual states have traditionally regulated their own laws regarding wrongful employment termination. The Texas Supreme Court employed that function with its ruling in the proceedings below. In its rulings on federal pre-emption of state laws, this Honorable Court has "presume[d] that Congress did not intend to pre-empt areas of traditional state regulations." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). *See also Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989). Accordingly, the new Texas law, which embodies a part of traditional state regulation, should not be pre-empted by ERISA.

In addition to this general presumption, Section 514 (c)(2) confirms that ERISA's specific pre-emption

clause is inapplicable to this case. ERISA pre-emption applies only to any governmental entity that "purports to *regulate*, directly or indirectly, *the terms and conditions of employee benefit plans covered by this subchapter*." (emphasis added). The Texas law set forth in the decision below has absolutely no affect or impact on the regulation of the terms and conditions of Petitioner's benefit plans. Rather, it deals solely with Petitioner's motivation for terminating Respondent's employment. Therefore, the decision below "regulates" a Texas employer's conduct and in no way "regulates" or attempts to regulate the terms or conditions of a pension plan. Accordingly, pre-emption is inappropriate.

Definitive evidence that this case does not involve the "regulation" of the "terms and conditions" of ERISA pension plans is found by Petitioner's total failure to plead pre-emption, ERISA or any specific terms and conditions of its pension plan. Indeed, there is no trial court pleading on which to conclude that Petitioner's pension plan qualifies as an ERISA plan. In addition to the fact that a failure to plead pre-emption is a waiver of that defense (see discussion *infra* at Section V), the absence of details regarding Petitioner's pension plan confirms the fact that the terms and conditions of Petitioner's plan are irrelevant to Petitioner's motivation for the termination of Mr. McClendon's employment.

Petitioner's argument for ERISA pre-emption rests precariously upon the presumptuous, but incorrect, assumption that the Texas Supreme Court's holding implicates or touches the general regulatory and administrative concerns for which ERISA was enacted. Congress expressly defineated its findings and declaration of policy with respect to ERISA and pension plans and stated:

> that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of (pension) plans . . .

29 U.S.C. § 1001(a). This case does not deal with the establishment, operation or administration of pension plans.

In addition, this Court has specifically held that ERISA's pre-emption provision does not relate to "employee benefits" but only to state laws governing "employee benefit *plans*" (emphasis added). *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11-12. In *Fort Halifax Packing Co. v. Coyne*, this Court held that a Maine plant closure statute requiring employers to provide a one-time severance payment to employees was not pre-empted by ERISA and stated:

> ERISA pre-emption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 522. The argument that ERISA pre-empts state laws relating to certain employee benefits, rather than to employee benefit *plans*, is refuted by the express language of the statute, the purposes of the pre-emption provision, and the regulatory focus of ERISA as a whole. *If a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems. Since the Maine severance payment statute raises no*

> *danger of such conflict, we hold that the statute is not pre-empted by ERISA.* (emphasis added).

Fort Halifax Packing Co. v. Coyne, 482 U.S. at 19.

Just as the State of Maine in *Fort Halifax Packing Co. v. Coyne*, the State of Texas in the case below has taken steps to protect its workers in accordance with the State's public policy. This protection, which takes the form of a cause of action for wrongful employment termination, does not relate in any way to the regulation of pension or benefit *plans*, and does not create a prospective conflict with ERISA. Just as in *Fort Halifax Packing Co. v. Coyne*, therefore, this Honorable Court should hold that the Texas law set forth in the case below is not pre-empted by ERISA.

The *Fort Halifax Packing Co. v. Coyne* Court also noted that ERISA was enacted because Congress desired to safeguard employees from "such abuses as self--dealing, imprudent investing and misappropriation of plan funds." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15, quoting 120 Cong. Rec. 29932 (1974). These are all factors that protect employees. The Texas Supreme Court's holding is totally consistent with this motivation. The Texas Supreme Court's holding below creating an exception to the at-will doctrine has absolutely no relationship to the types of abuses from which ERISA was designed to protect employees. The holding in no way alters the law with respect to the commingling of funds, self-dealing, or any other abuse that would clearly be for ERISA to govern. Rather, this opinion simply represents one state's decision to change its employment law to include a much needed protection for Texas workers. The opinion has absoluely no effect on the regulation or administration of any pension funds.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court addressed whether ERISA permits state tax authorities to collect unpaid state income taxes by levying upon taxpayer funds kept in an ERISA-covered benefit plan. This Court held that a state's right to enforce its tax levies is not of central concern to the ERISA statute. That is, even though the California statute would subject certain funds held in an ERISA plan to a state levy, this Court held that a state's right to enforce its tax levies is not something about which ERISA is concerned. This holding clearly impacts upon an ERISA plan with far more force than does the holding by the Texas Supreme Court in this case. The *Franchise Tax Board v. Construction Laborers Vacation Trust* holding enables states, under the proper circumstances, to remove certain funds from a pension plan that would otherwise be available to plan participants. The Texas Supreme Court's holding, on the other hand, has no effect on any pension plan and would require the employer, not the pension fund, to compensate the plaintiff. Moreover, a state's right to formulate its own laws with respect to employment termination is, like a state's right to enforce its tax levies, not something with which ERISA is concerned.

III.

PETITIONER HAS NOT MET AND CANNOT MEET ANY OF THE PRE-EMPTION TESTS ARTICULATED BY THIS COURT

In *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990), this Court identified the conditions necessary for federal legislation to pre-empt a state law: (1) Con-

gress explicitly defines the extent to which its enactment pre-empts state law; (2) absent explicit statutory language, state law is pre-empted when it regulates conduct in a field that Congress intended the federal government to occupy exclusively; and (3) state law is pre-empted to the extent that it actually conflicts with federal law. As will be demonstrated herein, none of these conditions is present in this case, and pre-emption is improper.

A. ERISA's Pre-emption Provision Specifically Excludes The State Law Before This Court

Section 514(a) of ERISA (codified at 29 U.S.C. § 1144 (a)) states that the ERISA provisions shall "supersede any and all state laws insofar as they may now or hereafter relate to any (covered) employee benefit plan," and § 1144(c) defines the term "state" to include a state or political subdivision or agency that "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." This Court has long recognized that Congress usually expresses the purpose of its legislation by the ordinary meaning of the words chosen by Congress, and a federal statute must be strictly construed to give effect to the plain meaning of the language employed by Congress. *U.S. v. Locke*, 471 U.S. 84, 95 (1985). The plain meaning of this statute mandates pre-emption only if the state law in question purports to regulate the terms and conditions of employee benefit plans covered by ERISA.

Initially, the law outlined by the Texas Supreme Court makes absolutely no mention of ERISA or plans governed by ERISA. The Texas law merely states that an employee

has a state cause of action if the principal reason for termination was the employer's desire to avoid paying benefits under an employee benefit plan. Petitioner does not and cannot show that the Texas Supreme Court's ruling constitutes a direct or indirect regulation of the terms and conditions of ERISA-covered employee benefit plans. The terms and conditions of a specific plan, as well as whether a specific plan is even covered by ERISA, are totally irrevelant to the Texas law. The only relevant inquiry is the employer's motivation for the termination. Accordingly, application of the "plain meaning" analysis shows that the statutory words employed by Congress expressly exclude this Texas state law from pre-emption.

The decisions of this Court confirm that state laws "relate to" ERISA-covered plans, and are subject to ERISA pre-emption (absent the state law falling into a specific ERISA exception) only when the state law purports to *regulate* the terms and conditions of ERISA benefit plans. For example, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court held that a New Jersey statute designed to prevent a procedure known as "integration" related to and was pre-empted by ERISA. The New Jersey statute regulated ERISA plans because it specifically eliminated one method for calculating pension benefits that was otherwise available and permissible under ERISA. In *Shaw v. Delta Air Lines, Inc.*, 453 U.S. 85 (1983), this Court held that state legislation mandating the payment of specific employee benefits and dictating the structure of benefit plans was pre-empted. That legislation specifically attempted to regulate the structure of benefit plans in a way that would preclude employers from discriminating against pregnant women. Similarly, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court held that a state statute requiring ERISA plans to provide minimum mental health care benefits was pre-empted wherein the state attempted to regulate the minimum benefits of ERISA plans. In addition, this Court has twice held that a state law tort or contract claim brought by a beneficiary asserting improper processing or denial of benefit claims under ERISA plans related to ERISA plans and were pre-empted by ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Both of these cases related directly to the processing or denial of ERISA claims. Finally, this Court has held that ERISA pre-emption applies when state laws expressly refer to and apply solely to ERISA benefit plans. *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 829 (1988). These cases confirm that ERISA pre-empts only state laws, that, unlike the law at issue in this case, attempts to regulate the terms and conditions of ERISA plans.

Conversely, when, as here, the state law does not attempt to regulate the terms and conditions of ERISA plans, this Court has held that ERISA pre-emption does not apply. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 22-23; *Mackey v. Lanier Collection Agency*, 486 U.S. at 833, 834.

Other federal Courts have confirmed that ERISA pre-emption does not apply to the type of case before the Court. In *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 146 (2nd Cir. 1989), the Court stated that ERISA only pre-empts state laws that (1) provide an alternate cause of action to employees to collect benefits under ERISA; (2) refer specifically to ERISA plans and apply solely to them; or (3) interfere with the calculation of benefits

owed to an employee. It is obvious that none of these situations is applicable to the present case.

In *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), a terminated employee sought to recover, among other things, lost accumulated and prospective pension benefits. Although accumulated benefits were pre-empted by ERISA, the Court held that the employee's state claim for the loss of prospective benefits was not pre-empted by ERISA. The Court noted that the claim raised no issue concerning matters pertaining to the regulation and administration of the pension plan and stated that the basic issue involved in this claim is no different from the issue that would be involved in a claim alleging that the employer conspired to force the employee to accept lower wages. *Scott v. Gulf Oil Corp.*, 754 F.2d at 1505. The Ninth Circuit has clearly held, therefore, that claims for lost prospective benefits are not pre-empted by ERISA unless they involve the regulation or administration of a pension plan. Based on this analysis, pre-emption does not apply to the case before the Court.

The Fourth Circuit adopted a similar analysis in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989). This case involved a wrongful termination action alleging, among other things, breach of an employment contract. The employment termination impacted upon the pension benefits available to the employee, and the state law cause of action sought to recover lost prospective benefits as a component of damages. The Court held that the state law causes of action relating to loss of prospective pension benefits were not pre-empted by ERISA. The Court based this holding on the analysis that the claims would not (1) submit the employer to conflicting employer obligations and variable standards of recovery; (2) determine whether any benefits

are paid; (3) affect the administration of benefits under the plan; or (4) be paid by the plan fiduciary with plan funds. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d at 120.

In *Schlenz v. United Airlines, Inc.*, 678 F. Supp. 230 (N.D. Cal. 1988), a case similar to the present case, a terminated employee brought a state law cause of action against the employer alleging that the employer terminated the employment because the employee (1) was about to vest in a pension plan; (2) was a higher paid employee because of seniority; and (3) was soon to be recalled to a higher paying position with the company. The basis of plaintiff's suit was that the plaintiff sought to recover damages for the lost opportunity to earn future benefits, including pension plan benefits, as a result of the employer's wrongful conduct. The Court held that the state law wrongful termination cause of action was not pre-empted by ERISA because it was unrelated to an employee benefit plan and touched, at best, only peripherally on ERISA.

The present case is more remote from an ERISA claim than the above cited cases. In this case, the Respondent seeks absolutely no pension benefits, past or future. Respondent has received his pension benefits. What he did not receive was continued employment; and the evidence shows that he was fired because the Petitioner wanted to avoid its pension obligation. The Texas Supreme Court has correctly held that the cause of action created by Petitioner's egregious conduct is a state cause of action that is not pre-empted by ERISA.

The Texas Supreme Court correctly held that such employer conduct is against sound public policy. The Court recognized that the employment-at-will doctrine

should not be used by an employer as a sword to exploit unfortunate employees and a shield to excuse the avoidance of pension plan obligations. Accordingly, the Supreme Court held that an employment termination engendered by an attempt to avoid pension obligations is actionable in the State of Texas. This holding has absolutely no effect on the regulation or administration of pension plans. Accordingly, Petitioner's requests for pre-emption should in all things be denied.

B. Congress, Through ERISA, Did Not Pre-empt The "Field" With Respect To All State Laws That Involve Pension Plans

As stated, this case involves a State's wrongful employment termination law and ERISA is inapplicable. It should be noted, however, that this Court has made it clear that Congress did not intend to pre-empt the "field" with respect to pension plans, and the second test set forth in *English v. General Electric Co.*, cannot be met. *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

This Court has stated that Congressional intent to supersede or pre-empt a state law must be "clear and manifest" if the area for which pre-emption is argued has traditionally been an area occupied or regulated by the states. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). As discussed in Section I, *supra*, regulation of the employment relationship has traditionally and historically been a function of state governments. As such, ERISA could not be held to pre-empt the Texas Supreme Court's holding unless Congress had a "clear and manifest" intent to pre-empt this particular state law setting forth an impermissible reason for an employment termination. This

is an area traditionally left to the regulation of the individual states, and there was no intent by Congress to pre-empt the law of employment termination.

In *Fort Halifax Packing Co. v. Coyne*, the Court stated:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. *Pre-emption assures that the administrative practices of a benefit plan will be governed by only a single set of regulations.*

Fort Halifax Packing Co. v. Coyne, 482 U.S. at 11. (emphasis added). As stated, this case does not involve the administrative practices of a benefit plan and pre-emption does not apply.

Petitioner seems to indicate that the mere mention of "pension plan" in connection with employment termination mandates ERISA pre-emption. Where, as here, a state law's relation to a benefit plan is at best "tenuous, remote or peripheral", ERISA pre-emption does not apply. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100. In addition, the *Shaw v. Delta Air Lines, Inc.* Court cited with approval *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2nd Cir. 1979), which held that ERISA did not pre-empt a state law that permitted garnishment of pension benefits in order to enforce alimony and child support orders. The Court held that despite the law's

direct effect on ERISA pension plans, the effect was remote and peripheral and, therefore, pre-emption was inappropriate. *Shaw v. Delta Air Lines, Inc.*, and the cases cited therein demonstrate that Congress did not attempt to pre-empt the entire "field" regarding pension plans.

As stated in *Fort Halifax Packing Co. v. Coyne*, Congress intended ERISA's pre-emption provisions to afford employers the advantages derived as a result of a uniform set of administrative procedures governed by one set of regulations. State laws, such as the one at issue, which do not deal directly with the administration of ERISA plans, are not pre-empted.

C. The Texas Supreme Court's Decision Creates Absolutely No Conflict With ERISA

Since the Texas Supreme Court's decision does not conflict with ERISA, pre-emption is also impermissible under the third test set forth in *English v. General Electric Co.*, 110 S.Ct. at 2275. There is no conflict between the Texas Supreme Court's holding enabling a terminated employee to bring a wrongful termination cause of action against an employer and the ERISA legislation designed to protect and preserve the integrity of pension plans. The Texas Supreme Court's opinion highlighted this fact:

> Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.*, 675 F. Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Electric Corp.*, 644 F. Supp. 806 (E.D. Pa. 1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledges in his brief to the Court of Appeals that he is not seeking lost pension benefits but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.

Respondent's cause of action in the Texas State Courts will address specifically the Petitioner's motivation for Respondent's employment termination and would implicate no ERISA concerns in any respect. It follows, therefore, that such a cause of action does not conflict with ERISA and is not pre-empted by ERISA.

If Respondent successfully proves that Petitioner terminated his employment in order to avoid making contributions to Respondent's pension fund, Petitioner, not the pension plan, will be liable for all damages recovered by Respondent. In *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987), the court held that ERISA pre-emption does not apply where, as here, the employer, and not the plan, would pay the damages. Respondent seeks no benefits from Petitioner's pension plan: Respondent's lawsuit does not and will not impact upon the administration of such plan's benefits in any way; and no damage payment would be made by the plan fidicuiary with plan funds. Accordingly, the newly-created Texas cause of action does not conflict with ERISA and is, therefore, not pre-empted by ERISA.

IV.

THE TEXAS LAW MAKES NO ATTEMPTS TO REGULATE ERISA PENSION PLANS

The Texas law at issue makes no attempt to regulate ERISA pension plans or any other types of pension plans. This Court has stated that the focus of ERISA is on the

"administrative integrity" of benefit plans. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15. The purpose of ERISA was to provide a set of standard procedures to guide the administration of pension plans. This Court has articulated the types of the potential problems that required the uniform rules of ERISA:

> A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others. . . . [The court continued that] [p]reemption ensures that the *administrative practices* of a benefit plan will be governed by only a simple set of regulations. (emphasis added.) *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 9-11.

The Texas Supreme Court's decision does not affect in any way the regulation or administrative practices of pension plans. Absolutely nothing regarding the terms, conditions or administration of Texas pension plans are affected by the new law. In accordance with *Fort Halifax Packing Co. v. Coyne*, the *administrative practices* of pension plans will still be governed by ERISA's single set of regulations. Since the purpose of the pre-emption provision is not affected by this law, pre-emption is improper.

Petitioner's brief alleges, for the first time and with no support in the record, that "unbeknownst to respondent . . . he was fully vested under the pension plan at the time of his termination."[3] Pet. Br. 20, n. 4. Petitioner uses

3. The record shows that Petitioner fired Mr. McClendon and denied his pension benefits. It was not until Mr. McClendon suffered hardship and filed a lawsuit hat Petitioner agreed to pay Mr.

this allegation to argue that the plan's complex vesting provisions would be the focus of Petitioner's defense in the trial Court in an effort to show that Respondent had already vested before he was terminated.

Petitioner's assertions, although not supported by the record, illustrate the inapplicability of ERISA and mandate the conclusion that ERISA pre-emption does not apply to the Texas law. Regardless of the complexity of the vesting provision or Petitioner's after the fact assertion that the pension vested before termination, the central issue under the Texas law is whether Petitioner, at the time of termination, fired Mr. McClendon to avoid pension benefits. If Petitioner terminated Mr. McClendon's employment for the principal reason of avoiding pension obligations, Petitioner is liable under Texas law regardless of the terms and conditions of Petitioner's plan. Even if the plan shows or Petitioner asserts that Mr. McClendon's pension vested before he was fired, he would still recover if Petitioner, at the time Mr. McClendon was fired, terminated Mr. McClendon's employment to avoid its pension obligations. Mr. McClendon does not seek pension benefits and does not raise any questions regarding vesting or Petitioner's plan. Rather, Mr. McClendon seeks what he lost because of his wrongful termination. Petitioner's own example, therefore, highlights the fact that the Texas law concentrates on the employer's motivation for firing an employee and does not attempt to regulate ERISA pension plans in any way.

McClendon's pension benefits. The relevant issue under the Texas law deals with Petitioner's motivation for the firing at the time of firing. If Petitioner did not understand the terms of its own plan and fired Mr. McClendon for the principal purpose of avoiding pension obligations, Mr. McClendon has a cause of action against Petitioner, and the cause of action is totally unrelated to ERISA.

V.

ALTHOUGH ERISA GENERALLY AND ITS PRE-EMPTION PROVISION SPECIFICALLY DO NOT APPLY TO THIS CASE, PETITIONER HAS WAIVED ANY RIGHT TO ASSERT ERISA AS A DEFENSE TO RESPONDENT'S TEXAS CAUSES OF ACTION

The record shows that Petitioner failed to assert ERISA and/or ERISA pre-emption as an affirmative defense in the trial court. Both Federal Rule of Civil Procedure 8(c) and Texas Rule of Civil Procedure 94 provide in pertinent part that a party shall set forth in a responsive pleading "any other matter constituting an avoidance or affirmative defense." An affirmative defense has been defined as a defense that raises matters extraneous to a Plaintiff's prima facie case. *Ford Motor Co. v. Transport Indemnity Co.*, 795 F.2d 538, 546 (6th Cir. 1986). It is well established that a litigant's failure to assert an affirmative defense in a responsive pleading results in a waiver of that defense. *Menendez v. Perishable Distributors, Inc.*, 763 F.2d 1374, 1379 (11th Cir. 1985). Further, Petitioner's claim of ERISA pre-emption is *a defense* to Respondent's cause of action. *Allstate Insurance Co. v. The 65 Security Plan*, 879 F.2d 90, 93 (3rd Cir. 1989), and such a defense clearly constitutes an affirmative defense pursuant to *Ford Motor Co. v. Transport Indemnity Co.* It is obvious from reading Petitioner's Original Answer (J. A. 8) that Petitioner failed to raise ERISA pre-emption as a defense, and such failure to raise this affirmative defense in any responsive pleading constitutes a waiver of the pre-emption defense. Accordingly, Petitioner cannot employ ERISA or ERISA pre-emption as a defense to Respondent's state law cause of action in this case.

VI.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

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